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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE SILVA,

Defendant and Appellant.

B270608

Los Angeles County
Super. Ct. No. PA062172

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Reversed in part, conditionally reversed in part, and remanded with directions.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Shawn McGahey Webb, David E. Madeo, and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Jesse Silva committed a first-degree murder in 2007 when he was 15 years old. In 2008, when Silva was 16 years old, he committed another first-degree murder and attempted, with premeditation and deliberation, to commit a third murder. In committing the two murders and the attempted murder, Silva used firearms, and he acted for the benefit of a criminal street gang when he committed the offenses. For the 2008 murder Silva committed when he was 16, he received a prison sentence of life without the possibility of parole (LWOP).

This is our fifth opinion in Silva's appeal. Silva contends his LWOP sentence is unconstitutional; Senate Bill No. 1391 (SB 1391) requires that two of his convictions be treated as juvenile adjudications; Proposition 57 entitles him to a transfer hearing in juvenile court; and Senate Bill No. 620 (SB 620) requires the trial courts to exercise discretion whether to strike his firearm enhancements.

BACKGROUND

In 2010, a jury convicted Jesse Silva of the first degree murders of Albert Molina in 2007 (count 1) and Johnny Ray Lopez in 2008 (count 3) (Pen. Code,¹ § 187, subd. (a)), each with a multiple murder special circumstance and a gang special circumstance (§ 190.2, subd. (a)(3), (22)); and the attempted willful, deliberate, and premeditated murder of Marvin Maldonado in 2008 (count 4) (§§ 664, 187, subd. (a)). The jury found true on each of the above offenses that Silva personally and as a principal used a firearm, intentionally discharged the

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

firearm, and intentionally discharged the firearm causing great bodily injury or death. (Former § 12022.53, subds. (b), (c), (d) & (e)(1).) The jury also convicted Silva of discharge of a firearm with gross negligence (count 2) (§ 246.3, subd. (a)) and assault with a firearm with personal use of a firearm (count 5) (former §§ 245, subd. (a)(2), 12022.5, subds. (a) & (d)). Each of the offenses was committed for the benefit of a criminal street gang (former § 186.22, subd. (b)(1)), and Silva had suffered a prior felony conviction (§ 667, subd. (d)). After resentencing on count 1, Silva's total prison term was LWOP plus 80 years to life.

In 2012, we affirmed Silva's conviction and sentence on appeal. (*People v. Silva* (May 16, 2012, B225127) [nonpub. opn.].) The California Supreme Court granted review and transferred the matter to us for reconsideration in light of *Miller v. Alabama* (2012) 567 U.S. 460. Later in 2012, we vacated Silva's sentence and remanded to the trial court for resentencing. (*People v. Silva* (Dec. 28, 2012, B225127) [nonpub. opn.].) Our Supreme Court again granted review and transferred the matter to us with directions to vacate our decision and reconsider the matter in light of *People v. Gutierrez* (2014) 58 Cal.4th 1354. We vacated the judgment in part and remanded for resentencing on count 3, the count on which Silva received the LWOP sentence, directing the court to exercise the full scope of its discretion under *Gutierrez*. (*People v. Silva* (Nov. 14, 2014, B225127) [nonpub. opn.].)

On February 23, 2016, the trial court conducted a resentencing hearing at which both parties presented evidence, and heard argument from both sides. The court again sentenced Silva to LWOP on count 3, plus a consecutive term of 80 years to life. Silva filed a timely appeal.

Our fourth opinion conditionally reversed the judgment and remanded to the juvenile court to conduct a transfer hearing under Welfare and Institutions Code section 707, subdivision (a). We subsequently granted Silva’s petition for rehearing to consider the effect of SB 1391 on our disposition. (*People v. Silva* (Jan. 11, 2019, B270608) [nonpub. opn.], reh’g. granted Feb. 11, 2019.)

We now reverse the judgment as to counts 1 and 2 and remand to the juvenile court to deem counts 1 and 2 juvenile adjudications, conduct a dispositional hearing, and impose an appropriate disposition on those counts, exercising its discretion as to the firearm enhancement on count 1. As to counts 3, 4, and 5, we conditionally reverse and remand to the juvenile court for a transfer hearing, with subsequent proceedings as detailed below.

DISCUSSION

1. *Silva’s challenges to his LWOP sentence are not ripe*

Silva contends the trial court’s 2016 reimposition of his LWOP sentence is unconstitutional cruel and unusual punishment under the Eighth Amendment, and the trial court incorrectly applied *Montgomery v. Louisiana* (2016) ___ U.S. ___ [136 S.Ct. 718], and its interpretation of *Miller v. Alabama* (2012) 567 U.S. 460. He also contends he was entitled to a presumption favoring a parole-eligible sentence; the trial court did not make the required finding that he was “among the very rarest of juvenile offenders for whom rehabilitation is impossible,” and abused its discretion when it reimposed the LWOP sentence; he was entitled to a jury determination whether he was in that group of offenders; and his LWOP sentence is categorically barred by the California Constitution.

While this appeal was pending, Governor Brown signed Senate Bill No. 394 (2017-2018 Reg. Sess.) (SB 394). SB 394 became effective January 1, 2018, amending section 3051 to add subdivision (b)(4):

“A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.”

The amended statute applies to cases that, like Silva’s, were not final when the amendments became effective. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

Silva’s petition for rehearing argues the revised statute does not guarantee him a parole suitability hearing, because his sentence on count 4 was imposed under the Three Strikes law (§§ 1170.12, 667, subds. (b)-(i)) and thus he may be ineligible for a future youth offender parole hearing. Section 3051, subdivision (h) provides: “This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61.”

As we describe below, however, counts 1 and 2 will be remanded to the juvenile court for disposition, and will not be subject to a hearing to determine whether to transfer to adult criminal court. Counts 3, 4, and 5 will be remanded to the

juvenile court for a transfer hearing. It is possible that all or some of counts 3, 4, and 5 also may not be transferred to adult criminal court. “If the case is not transferred, the constitutionality of section 3051 will be irrelevant. And even assuming the case is transferred, the trial court has yet to determine appellant’s sentence and his earliest parole eligibility date. Until a new sentence is imposed, it is uncertain whether the same constitutional concerns will arise. Accordingly, we decline to issue an advisory opinion addressing those concerns.” (*People v. Garcia* (2018) 30 Cal.App.5th 316, 328-329.) We will not provide what may only be an advisory opinion on the constitutional issues presented by Silva’s current sentence. (*People v. McKay* (2002) 27 Cal.4th 601, 627.)

2. *Counts 1 and 2 must be deemed juvenile adjudications and remanded for appropriate disposition in juvenile court*

Silva’s petition for rehearing, filed January 22, 2019, argues he is also entitled to application of SB 1391, signed by Governor Brown on September 30, 2018 and effective on January 1, 2019, during the pendency of Silva’s appeal. SB 1391 repeals the prosecuting attorney’s authority to make a transfer motion in a case in which the minor defendant was 14 or 15 years old at the time of the offense. (Legis. Counsel’s Dig., Sen. Bill No. 1391, Stats. 2018 (2017-2018 Reg. Sess.)) “Following the entry into force of Senate Bill No. 1391, individuals who were under 16 years of age when they committed any criminal violation . . . may no longer be transferred to adult/criminal court at all.” (*People v. Castillero* (2019) 33 Cal.App.5th 393, 399.) Respondent agrees that SB 1391 is retroactive because it might mitigate punishment, and therefore SB 1391 applies to cases

that, like Silva's, are not yet final. (See *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009, 1038.)

Silva was 15 years old in 2007 when he murdered Molina and discharged a firearm with gross negligence (counts 1 and 2). His convictions on counts 1 and 2 therefore must be reversed and remanded to the juvenile court. The juvenile court shall treat the convictions on counts 1 and 2 as juvenile adjudications, and must impose an appropriate disposition in its discretion.

3. Counts 3, 4, and 5 must be remanded to the juvenile court for a transfer hearing

Silva argues Proposition 57 applies retroactively to his case, and we agree.

Silva was charged in adult criminal court under the law then in effect, which permitted the prosecutor to charge the case directly in adult criminal court. In November 2016, long after Silva had been convicted and sentenced in 2010 but while his case remained pending on appeal, the voters passed Proposition 57, the Public Safety and Rehabilitation Act of 2016. Proposition 57 eliminated direct filing and prohibited prosecutors from charging juveniles with crimes directly in adult criminal court. Under Proposition 57, the action must commence in juvenile court; if the prosecution wishes to try the juvenile defendant as an adult, the juvenile court must conduct a transfer hearing. (See Welf. & Inst. Code, § 707, subd. (a); *People v. Phung* (2018) 25 Cal.App.5th 741, 762.) “Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult.” (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 (*Lara*).) In *Lara*, our Supreme Court concluded that Proposition 57 offered defendants the possibility of treatment as a juvenile in juvenile court, and therefore the

inference of retroactivity of *In re Estrada* (1965) 63 Cal.2d 740 allowed the proposition's "ameliorative changes" to apply to defendants whose sentences were not yet final. (*Lara*, at pp. 308-309.) Silva's appeal was pending and his case was not yet final when Proposition 57 went into effect, and so he is entitled to its benefits.

We transfer the matter to the juvenile court for a transfer hearing as to counts 3, 4, and 5.

"When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the defendant's] cause to a court of criminal jurisdiction. ([Welf. & Inst. Code] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the defendant] to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then [the defendant's] convictions and sentence are to be reinstated. ([Welf. & Inst. Code,] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [the defendant] to a court of criminal jurisdiction, then it shall treat [the defendant's] convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion.'"

(*Lara, supra*, 4 Cal.5th at p. 310.)

“ ‘[T]here are key differences between a Proposition 57 transfer hearing and the analogous fitness hearing under prior law. Most notably, Proposition 57 shifts the burden of proof in the hearing. Under prior law, the juvenile court was bound by a rebuttable presumption that the defendant was not fit for the juvenile court system, whereas under current law there is no such presumption. [Citation.] In addition, the court at appellant’s fitness hearing could not retain jurisdiction unless it found him fit for juvenile court under all five criteria. [Citation.] In a transfer hearing under current law, the court must consider all five factors, but has broad discretion in how to weigh them.’ ”

(*People v. Castillero, supra*, 33 Cal.App.5th at p. 398.)

4. *The juvenile court and the adult criminal court shall exercise discretion under SB 620*

The trial court imposed a 25-year sentence for the section 12022.53, subdivision (d) firearm enhancement on count 1, and stayed punishment for firearm enhancements under section 12022.53, subdivisions (b) and (c) on count 1, under section 12022.53, subdivisions (b), (c), and (d) on count 3, under section 12022.53, subdivisions (c) and (d) on count 4, and under section 12022.5, subdivisions (a) and (d) on count 5. We requested, and received, supplemental letter briefs on the effect of SB 620’s amendment of sections 12022.5, subdivision (c), and 12022.53, subdivision (h), effective January 1, 2018.

As to counts 3, 4, and 5, we agree with Silva that, as a defendant whose sentence is not yet final on appeal, he is entitled to the trial court's exercise of its newfound discretion whether to strike the firearm enhancements. In sentencing Silva, "the trial court gave no indication whether it would exercise discretion to strike the firearm enhancement . . . if it had such discretion." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.)

"[S]peculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

Under SB 1391, Silva's conviction on count 1 will become a juvenile adjudication and will remain in juvenile court for an appropriate disposition within the court's discretion. The juvenile court shall also exercise its discretion to strike or dismiss the firearm enhancement on count 1, under SB 620. (*People v. Hargis* (2019) 33 Cal.App.5th 199, 210.) As to counts 3, 4, and 5, if the juvenile court determines that those counts properly belonged in adult criminal court, the juvenile court shall transfer the case to adult criminal court, and that court shall reinstate the convictions and exercise its independent discretion under SB 620.

DISPOSITION

The judgment as to counts 1 and 2 is reversed and the matter is remanded to the juvenile court with the following directions. Counts 1 and 2 are to be deemed juvenile adjudications, and the juvenile court shall conduct a dispositional hearing within its usual timeframe and impose an appropriate disposition within its discretion under juvenile law, which includes the discretion to strike the firearm enhancement in count 1.

The judgment as to counts 3, 4, and 5 is conditionally reversed and remanded to the juvenile court with the following directions. No later than 90 days from the filing of the remittitur, the juvenile court is directed to conduct a transfer hearing under Welfare and Institutions Code section 707, subdivision (a). If, at the transfer hearing, the juvenile court determines it would have transferred any of counts 3, 4, and 5 to adult criminal court, then those counts will be transferred to adult criminal court and the convictions reinstated. The adult criminal court shall then resentence and exercise its independent discretion whether to strike the firearm enhancements.

If, at the transfer hearing, the court determines it would not have transferred any of counts 3, 4, and 5 to the adult criminal court, Silva's criminal convictions on those counts shall be deemed a juvenile adjudication as of that date. The juvenile court shall conduct a dispositional hearing within its usual timeframe and impose an appropriate disposition within its discretion under juvenile law, which includes the discretion to strike the firearm enhancements.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.